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IN THE

# Supreme Court of the United States

October Term, 1955

No. 226

M. W. Kaye, Administrator, with the Will Annexed of the Estate of Morris Schuman, Deceased,
*Petitioner,*

v.

Louise Wells Brueggeman, Lois Wells Robinson, Lavon Wells Wuttermeister, and Dayton O.C. Company, a corporation, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LOUISE WELLS BECHLER, LOIS WELLS ROBINSON, LAVON WELLS WINTERRINGER, and DAVON OIL COMPANY, a corporation, *Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner, M. W. Kaye, Administrator, with the Will Annexed of the Estate of Morris Schuman, Deceased, prays that a writ of certiorari issue to review

the judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The opinion of the District Court (T. 22-23)[1] is printed as Appendix A, *infra*. The opinion of the Court of Appeals for the Tenth Circuit reversing the judgment of the District Court, printed as Appendix B, *infra*, has not yet been reported. The opinion of the Court of Appeals for the Tenth Circuit denying the petition for rehearing, printed as Appendix C, *infra*, has not yet been reported.

## JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on February 21, 1955. Rehearing was denied on April 13, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## QUESTIONS PRESENTED

1. Where defendants (Respondents) failed to plead laches as required by Rule 8(c), Federal Rules of Civil Procedure, and raised the defense of laches for the first time on appeal, may a Court of Appeals reverse a District Court's judgment for the plaintiff (Petitioner) on the ground that the action was barred by laches?

2. Morris Schuman (of whose Estate Petitioner is Administrator) and Charles E. Wells (of whom

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[1] This Petition makes reference to the Transcript of Record in the District Court and to the Appendix to this Petition. References to the Transcript of Record are designated by "T." preceding the page number. References to the Appendix to this Petition are designated by "App." preceding the page number.

Respondents[2] are the heirs) entered into a joint venture for the purchase and sale of real property in which each was to have an undivided one-half interest and was to share equally in the profits. Wells caused title to certain of the property acquired by the joint venture to be placed in his name without the knowledge of Schuman and contrary to the terms of their agreement.

The question presented is whether the Court of Appeals reached a decision contrary to the law of Oklahoma in determining that a cause of action to recover Schuman's interest in the property accrued upon the death of Wells, so as to commence the running of the period of limitations at such date, where Schuman did not have knowledge to the time of his death of Wells' action and where Petitioner did not have knowledge of any repudiation of the trust until several years later.

## STATUTES AND RULES INVOLVED

Rule 8(c), Federal Rules of Civil Procedure, provides as follows:

> "(c) AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counter-

[2] Respondent, Davon Oil Company, is assignee of an oil and gas lease, on certain of the real property in question, made to one C. H. LaFever by Wells on March 20, 1946.

> claim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

Rule 12(h), Federal Rules of Civil Procedure, provides as follows:

> "(h) WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received."

Rule 52(a), Federal Rules of Civil Procedure, provides in part as follows:

> "(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

The relevant Oklahoma statutes of limitations are set out in Appendix D, *infra*.

## STATEMENT

Jurisdiction of the District Court was based upon diversity of citizenship: the plaintiff was a citizen of Arkansas, the individual defendants were citizens of Oklahoma; and the defendant Davon Oil Company was an Oklahoma corporation. The matter in controversy, exclusive of interest and costs, exceeded the sum of three thousand dollars (T. 2).

Morris Schuman and Charles E. Wells entered into a joint venture in 1939 for the acquisition, holding, selling, leasing, renting and disposing of real property (T. 3). Wells was Schuman's attorney (T. 82) and the closest relationship of mutual confidence existed between them (T. 68, 69). Although their written agreement could not be produced, parol evidence was introduced establishing the existence and nature of the agreement (T. 22). The trial court specifically found that there was a written partnership agreement (T. 22), and the Court of Appeals also noted that the agreement was in writing (App. 9). Under the agreement, Wells was to advance the necessary funds and Schuman was to contribute his experience, ability, and services (T. 36). Each was to have an undivided one-half interest in any property acquired and all profits derived, after money advanced by Wells was repaid (T. 37). Title to property acquired by the joint venture was to be placed in the name of Schuman's son, J. J. Schuman, who was to act as trustee for the joint venture (T. 22). On January 21, 1941, Morris Schuman and J. J. Schuman signed a note in favor of Wells for advances made to that date, as partial security for which Morris Schuman pledged a diamond ring (T. 22, 34).

In 1941, J. J. Schuman executed and delivered to Wells blank deeds for the purpose of facilitating the sale and transfer of property owned by Morris Schuman and Wells and held in the name of J. J. Schuman (T. 67, 123, 124, 165). Subsequently, Wells used one of these blank deeds, dated July 19, 1941, to convey certain of the partnership property to himself for the purpose of protecting himself because of the illness of both Morris Schuman and J. J. Schuman (T. 66, 67, 68, 69, 124). The District Court found that neither Morris nor J. J. Schuman was aware that this property had been taken out of the name of J. J. Schuman and placed in the name of Wells (T. 22). Thereafter, Morris Schuman and Wells both continued to regard the property as owned by the joint venture, and considerable evidence was submitted to the trial court substantiating this (T. 242, 243, 244, 246, 247, 248, 250, 251, 252, 253, 254, 256, 260, 261, 262, 263, 264). The books and records of the partnership were at all times held in Wells' office, and Wells' bookkeeping with respect to the property included in the July 19 deed continued as before, and he continued to submit reports on the property to Morris Schuman (T. 51, 52, 127).

Wells died testate on July 14, 1946, and property included in the deed of July 19, 1941, passed to Respondents under his will (T. 22). The trial court found that Morris Schuman believed, both before and after the death of Wells, that all of the property of the joint venture was held in the name of J. J. Schuman (T. 22). After the death of Wells, *ad valorem* taxes on the property were paid by Morris Schuman's brother, for which he was reimbursed by Morris Schuman (T. 101 *et seq.*). Morris Schuman, however, because of his own serious illness, was not able to devote any attention to the status of the property (T. 7, 83-84).

Morris Schuman died testate on March 1, 1948. After his death, J. J. Schuman, acting on the assumption that title to all of the property acquired by the joint venture was still in his name, visited the executor of the Wells estate in order to "straighten up" the disposition of this property in a manner which would be equitable to both estates (T. 87, 219). The executor of the Wells estate told J. J. Schuman that the property would be divided after the note of January 21, 1941, was paid off (T. 87).

Upon discovery of the facts (T. 22), Petitioner instituted this action against Wells' heirs in the United States District Court for the Western District of Oklahoma, seeking a decree that Morris Schuman owned an undivided interest in the property in question, requesting an accounting by the Respondents, and requesting return of the ring pledged as security for the note of January 21, 1941 (T. 2-9). *The District Court found that Wells, at the time of his death, held title to property belonging to Morris Schuman acquired by him under circumstances constituting him a trustee for Schuman, which trust had never been repudiated (T. 23). It decreed that Petitioner was owner of an undivided one-half interest in the property in question and directed an accounting by the individual Respondents of all assets of the joint venture (T. 25); and also directed return of Morris Schuman's ring to Petitioner (T. 24-27). The Court specifically found that the circumstances justified the delay in instituting the action and that no person's rights had been prejudiced by the delay (T. 23). There was ample undisputed evidence available to the District Court on the basis of which a full reconstruction of events could be made (T. 80, 81, 165, 180, 189, 406, 409) and the*

*District Court had no difficulty in learning the truth about the transactions in question.* It rejected Respondent's contention that the Oklahoma statute of limitations barred the action, since in its view the statute would not commence to run until repudiation of the resulting trust (T. 23.).

On appeal, the Court of Appeals for the Tenth Circuit reversed the judgment of the District Court on the grounds that the action was barred by limitations and laches (App. 8). It held that the period of limitations under Oklahoma law was five years from the date the cause of action accrued (App. 8-9), and that the cause of action had accrued at the date of the death of Wells which had occurred six years prior to institution of the suit (App. 8-9). It held further that Petitioner's delay in instituting the action obscured the truth surrounding the transactions in controversy, warranting application of the doctrine of laches (App. 7). Notwithstanding its general reversal of the District Court on the ground that Petitioner's action was barred by limitations and laches, the Court below affirmed the judgment of the District Court to the extent that it directed return of Morris Schuman's diamond ring (App. 10). The opinion of the Court of Appeals was written by Judge Ritter, of the District Court of Utah, sitting by designation. Chief Judge Phillips concurred, and Judge Murrah concurred in the result (App. 10). A petition for rehearing was denied in a written opinion (App. 11-14).

## REASONS FOR GRANTING THE WRIT

### I

Respondents raised the question of laches for the very first time on appeal. It was not included in Re-

spondents' pleadings in the District Court (T. 19-20).

Rule 8(c), Federal Rules of Civil Procedure, provides that "in pleading to a preceding pleading, a party shall set forth *affirmatively* ... laches ... " (emphasis added); and Rule 12(h), Federal Rules of Civil Procedure, expressly provides that "a party waives all defenses and objections which he does not present either by motion ... or ... in his answer or reply. ..."

Decisions of the federal courts without deviation strongly affirm the vigorous application of these rules in holding that the defense of laches, if not pleaded, is waived, and may not be raised for the first time on appeal. *Tornello* v. *Deligiannis Brothers, Inc.,* 180 F. 2d 553 (C.A. 7); *Riley* v. *Titus,* 190 F. 2d 653 (C.A. D.C.), cert. den. 342 U.S 855, rehg. den. 342 U.S. 889; *Bergeron* v. *Mansour,* 152 F. 2d 27 (C.A. 1); *Callaway* v. *Hamilton National Bank of Washington,* 195 F. 2d 556 (C.A. D.C.); *Rank* v. *Krug,* 90 F. Supp. 773 (S.D. Cal.). The flavor of this line of cases is well illustrated by the language of the Court of Appeals for the First Circuit in *Bergeron* v *Mansour, supra*:

> "To assert the defense of laches one must plead that defense affirmatively in his answer * * *
>
> "The defendant neither pleaded nor brought in issue in the trial court the question of laches. He asserts, however, that the point has been properly raised for review on appeal. Notwithstanding his contentions to the contrary, we can find no evidence in the record or in the proceedings below of any assertion of this defense. The record unquestionably discloses considerable delay by the plaintiff in commencing her action after learning of the defendant's intention to plead the statute of limitations. But there is nothing to show to what

> such delay was attributable. 'If appellant desired to rely on this ground, it should have presented and preserved in the record evidence justifying the conclusion that culpable delay was attributable to appellee.' * * * The defendant had ample opportunity of which he did not see fit to avail himself, to amend his answer and include the defense of laches. * * * The question of laches not having been presented in any form to the trial court can not now be raised for the first time on appeal. * * *
>
> "It is the general rule that courts of review will not consider questions which have not been raised and tried in the trial court. * * *"

The decision of the Court below that laches barred Petitioner's action places it in direct conflict with these decisions, and with similar decisions involving failure to plead estoppel, which also must be affirmatively pleaded under Rule 8(c). See *Wackerle* v. *Pacific Employees Insurance Company,* 219 F. 2d 1 (C.A. 8); *Strouhal* v. *Allied Development Co.,* 220 F. 2d 541 (C.A. 10); *Cummings* v. *Moore,* 202 F. 2d 145 (C.A. 10). Indeed, the decision of the Court below is in direct conflict with its own recent decisions in *Strouhal* v. *Allied Development Co., supra,* and *Cummings* v. *Moore, supra.*

It is clear, moreover, that the identical rule applies under Oklahoma law, and that the defense of laches must be pleaded and cannot be raised for the first time on appeal. *Neff* v. *Calk,* 198 Okl. 379, 178 P. 2d 624.

The action of the Court below in reversing the District Court on the basis of the doctrine of laches, which was not pleaded in the trial court by Respondents as required by Rule 8(c), and under Rule 12(h) must

be regarded as waived, becomes even more astonishing[3] when consideration is given to the manner in which the Court below disposed of the laches question on its merits.

In its opinion reversing the District Court, the Court below based its holding that laches was applicable upon the following:

> "The events which brought about the action have become obscured by the passing of time. The truth surrounding the transactions in controversy cannot now be determined with any assurance. The evidence is seriously in conflict. It is extremely difficult to be sure that justice is being done. The only persons who knew the truth were dead at the time of the trial. The written contract between the partners was not produced at the trial. Ledger sheets and records concerning the most valuable tract of land in this suit could not be produced. One of the most serious disadvantages, and hence prejudice, from a long lapse of time is the loss of ability to prove the truth." (App. 7).

But the District Court which heard the witnesses and studied the evidence at first hand had no difficulty in reconstructing the circumstances and ascertaining the truth. Its findings of facts were supported not only by substantial evidence, but by the overwhelming weight of the evidence. No evidence was produced by Respondents establishing that any record necessary to a complete accounting was unavailable. The Court below arbitrarily rejected the findings of fact of the District

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[3] It is also astonishing that the Court below, notwithstanding its conclusion that Petitioner's "claim is stale and, in any event, is barred" (App. 6), affirmed the District Court's judgment in part in directing the return of Morris Schuman's ring (App. 10).

Judge. It did so on the basis of a "dead" record which did not raise the question of laches.

The best illustration of the arbitrary nature of the decision of the Court below may be found in comparing the statement of the Court below that the doctrine of laches was applied because:

> "It is the prejudice caused by the delay in seeking relief after the action accrues which determines its [laches] application. ... Appellants are placed at a disadvantage in attempting to prove events obscured through lapse of time." (App. 13).

with the statement of the District Court that

> "No person's rights have been prejudiced by the delay in bringing action and the circumstances surrounding the transaction are found to justify the delay in its institution." (T. 23).

Just as the Court below ignored Rule 8(c) and Rule 12(h), Federal Rules of Civil Procedure, so also it ignored Rule 52(a), Federal Rules of Civil Procedure, and a long line of judicial precedents, including many of its own making, as to the proper role of a court of appeals in reviewing findings of fact by a district judge.

Rule 52(a) specifically provides that where an action is tried upon the facts without a jury, "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The opinions of the Court below do not reflect any conclusion that the District Court's findings were "clearly erroneous"; nor do they reflect any

regard for the District Judge's special competence and opportunity to pass upon questions of fact because he has seen and heard the witnesses.

This Court has consistently maintained that findings of fact by a district court may be reversed only if they are "clearly erroneous." In *United States* v. *Yellow Cab Co.*, 338 U.S. 338, at 341, this Court stated, citing Rule 52(a), Federal Rules of Civil Procedure:

> "Findings as to the design, motive, and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them * * *
>
> "While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous' ".

Similarly, this Court stated in *Walling* v. *General Industries Co.*, 330 U.S. 545, at 550:

> "We believe that the evidentiary facts afford an adequate basis for the inferences drawn by the Court in making such additional findings. At the least, we think that in drawing such inferences the Court was not clearly wrong, and conclude that the findings should therefore have been left undisturbed. The Circuit Court of Appeals' rejection of these findings cannot rest on the conflicting testimony of petitioner's witnesses. The District Court heard the witnesses, and was the proper judge of their credibility."

See also *Besser Manufacturing Co.* v. *United States,* 343 U.S. 444; *United States* v. *Oregon State Medical Society,* 343 U.S. 326.

That the decision of the Court below is a flagrant departure from the sound principles of appellate review which it has itself enunciated in recent years is apparent upon review of its vigorous statements in other cases.

> "If from the established facts, reasonable men might draw different inferences, it is not within the province of this court to substitute its judgment for that of the trial court as to which inference should be drawn." *Widney* v. *United States,* 178 F. 2d 880, 884 (C.A. 10).

> "In the trial of a non-jury case, it is the province of the trial court to observe the witnesses while testifying, to judge their qualifications, to appraise their credibility, to determine the inferences from the facts established, and to resolve conflict in the evidence. The evidence and the inferences fairly to be drawn from it were sufficient to support the material findings of fact made by the trial court, and they are not plainly erroneous. Therefore they must stand on appeal." *United Brotherhood of Carpenters* v. *Sperry,* 170 F. 2d 863, 867 (C.A. 10).

The Federal Rules of Civil Procedure govern the procedure in the district courts in all civil cases. Rule 1, Federal Rules of Civil Procedure. They have the force and effect of statutes. *Canister Co.* v. *Leahy,* 182 F. 2d 510 (C.A. 3); *Winsor* v. *Daumit,* 179 F. 2d 475 (C.A. 7); *Winkelman* v. *General Motors Corporation,* 48 F. Supp. 504 (S.D.N.Y.); *Kuenzel* v. *Universal Carloading and Distributing Co.,* 29 F. Supp. 407 (E.D. Pa.); *Barrezueta* v. *Sword S.S. Line, Inc.,* 27 F. Supp.

935 (S.D.N.Y.). As stated in *Beasley* v. *United States*, 81 F. Supp. 518, 527 (E.D.S.C.):

> "Of course, the Court and all the parties are bound to follow the Rules of Civil Procedure just as they would be required to obey a statute."

See also *Canister Co.* v. *Leahy, supra; Barrezuta* v. *Sword S.S. Line, Inc., supra.* Since they establish the procedure under which justice is administered in the federal courts, there should be clarity and precision in their application. Corrosion of their purpose, looseness in their application—no matter how creeping and slight—should not be tolerated; and only this Court has the power to effect full and uniform adherence to their requirements.

## II

The Court of Appeals held that under Oklahoma law a five year period of limitations applied, regardless of the particular theory upon which Petitioner's action was founded,[4] and that the cause of action accrued so as to commence the running of the limitations period upon the death of Wells. In reaching the conclusion that the statute of limitations commenced running upon the death of Wells, the Court of Appeals relied primarily upon decisions of the Supreme Court of California (App. 8).

The principle enunciated in the line of California decisions cited by the Court below is most succinctly

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[4] The Court below expressed uncertainty as to whether Petitioner's action was founded upon a breach of trust growing out of the partnership agreement or was for a partnership accounting (App. 8, 9).

stated in the third paragraph of the syllabus in the case of *Norton* v. *Bassett,* 154 Cal. 411, 97 Pac. 894, as brought to the attention of the Court below in Respondents brief on appeal, pp. 32-33.

> "Where one who has purchased property for the benefit of himself and others under an agreement that they shall share in the proceeds, and who has, therefore, become as to such property, a voluntary trustee, dies, and his title descends to his heir at law, the latter becomes an involuntary and not a voluntary trustee, and the statute of limitations, as to actions against him to establish and enforce the trust, commences to run at once, without any demand being made on him. . . ."

But whatever the law may be in California,[5] it is clear that this is not the law in Oklahoma. The Supreme Court of Oklahoma has consistently maintained that a cause of action does not arise until the repudiation of the trust, and it is only then that the statute of limitations commences to run. *Allen* v. *Garman,* 201 Okl. 146, 202 P. 2d 1073; *McGill* v. *McGill,* 189 Okl. 3, 113 P. 2d 826; *Leedy* v. *Ellis County Fair Association,* 188 Okl. 348, 110 P. 2d 1099; *Blunck* v. *Blunck,* 172 Okl. 255, 44 P. 2d 325; *Foster* v. *Wilkinson,* 96 Okl. 110, 220 Pac. 325. Nothing in any of these decisions suggests that a different rule would be applied where legal title passes from an original "voluntary" trustee before there has been a repudiation. Indeed, there are decisions of the Supreme Court of Okahoma involving this factual situation in which the general Oklahoma rule has been applied. See *McGill* v. *McGill,* 189 Okl.

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[5] There is, however, a recognized exception under California law of the principle announced in *Norton* v. *Bassett, supra, cf. Cohn* v. *Cohn,* 7 Cal. 2d 1, 59 P.2d 969, within which this case would clearly fall.

3, 113, P. 2d 826; *Foster* v. *Wilkinson,* 96 Okl. 110, 220 Pac. 325.[6]

The question whether or not the Court below correctly applied Oklahoma law in this case may, in the context of this case, not be one of overwhelming importance in and of itself. But there is an important question. The issue is whether a Court of Appeals may disregard clearly formulated principles of applicable

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[6] The only Oklahoma decision relied upon by the Court below as authority for the proposition that limitations commence running upon death of a trustee or a partner who holds title to property is *Swartz* v. *Dennis,* 208 Okl. 334, 255 P.2d 923. But this case was decided on the basis of laches, and the court's discussion of limitations was gratuitous. Moreover, in considering the question of limitations in this case, the court was concerned only with ascertaining which particular statute of limitations applied, and was not concerned with *when* the statute commenced to run, although it did say in passing and without full consideration that the statute started running upon death of the partner holding title to the partnership property.

The facts in this case, furthermore, clearly preclude reliance upon *Swartz* v. *Dennis* as authority for the proposition that the cause of action accrues upon the death of the partner holding title to partnership property. One of the plaintiffs in that case was the brother (himself a partner) of the deceased partner, and as administrator of his brother's estate had 12 years before the action was instituted listed the partnership property as property of the deceased partner's estate. The other plaintiff, the widow of another partner, was found to be not a proper party to the action.

It would appear that the correct rule under Oklahoma law as to when the period of limitations starts to run where a partner holding title to partnership property dies is that stated in *Foster* v. *Wilkinson, supra.* In that case, the Supreme Court of Oklahoma held that the statute of limitations did not commence running upon the death of a partner holding title for purposes of liquidating partnership property when the partnership terminated, but rather upon liquidation of the property by the administrator of his estate.

state law and reject out of hand well considered legal conclusions of a district judge thoroughly experienced in the laws of his state.[7]

In this case the decision of the District Judge for the Western District of Oklahoma, who has first-hand experience in Oklahoma law, was rejected, almost summarily, by the Court of Appeals for the Tenth Circuit obviously less experienced in and knowledgeable concerning Oklahoma law. The opinion of the Court below on this question was based upon the flimsiest reference to pertinent decisions of the Supreme Court of Oklahoma and relied primarily upon irrelevant authority of other jurisdictions.

We believe that this case demonstrates the necessity on occasion for intervention by this Court in federal court cases involving the application of state law so as to serve notice that slipshod application or flagrant misapplication of state law will not be tolerated.

## III

Subsequent to the decision of the Court below reversing the judgment of the District Court, the District Judge had occasion, in the course of further proceedings in this case[8] to express his opinion of the manner in which the Court of Appeals for the Tenth Circuit disposed of this case on appeal. The full text of these proceedings is set out as Appendix E, *infra*.

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[7] Judge Ritter, who wrote the opinion of the Court below, is District Judge of the District Court of Utah sitting by designation in this case. Judge Murrah, a former District Judge in Oklahoma, had special experience in Oklahoma law, and he concurred only in the result. (App. 10)

[8] On motion to spread the opinion of the Court of Appeals of record in the District Court.

Judge Chandler's remarks demonstrate that the serious deficiencies in this case stem directly from the failure of the Court below to confine itself within the proper scope of appellate review. They serve also as a reminder of the sound principle that courts of appeal should afford great respect and deference to the conclusions of district courts on questions of state law, because of their far greater familiarity with and experience in applying state law.

Two questions are presented in this petition. One is a question of federal law under the Federal Rules of Civil Procedure with respect to the failure to plead and the consequent waiver of the defense of laches. The other question is whether state law was correctly applied with respect to limitations. Both questions have their genesis in the fact that the Court below failed to follow the accepted course of judicial proceedings. The Court below has at one and the same time handled important questions of federal practice and procedure in a manner which conflicts with decisions of other courts of appeal, as well as with its own decisions, and has also decided an important state question in a manner which conflicts with applicable state law. Basic principles have been capriciously ignored and abused, thereby thwarting Petitioner in his effort to enforce his legal rights. This Court should not acquiesce in such a flagrant departure from the accepted course of proceedings in the federal courts.

## CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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